NO. 24917-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

HECTOR M. PRADO,

Defendant/Appellant.

APPELLANT'S BRIEF

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1. Hector Prado was precluded from effectively arguing his theory of self-defense and/or defense of property due to the inadequate nature of the jury instructions which:

a.) Limited the "no duty to retreat" instruction to the charge of second degree murder;

b.) Excluded reckless endangerment as a lesser-included offense of first degree assault;

c.) Excluded RCW 9.41.270(1) as a lesser-included offense of first degree assault and/or a potential defense; and

d.) Used an improper instruction previously determined to be confusing to a jury.

2. Defense counsel's failure to be aware of the defective jury instruction concerning defense of property constitutes ineffective assistance of counsel.

3. The State's failure to timely file a motion for reconsideration after the trial court initially denied specific items of restitution voids the imposition of that restitution.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did placement of the "no duty to retreat" instruction immediately following the other instructions relating to second degree murder prevent the jury from considering that instruction in relation to the offense of first degree assault?

2. Is reckless endangerment a lesser-included offense of first degree assault?

3. Should the trial court have given an instruction based upon RCW 9.41.270(1) when supported by the evidence, and when it also constitutes a lesser-included offense?

4. Was it error to instruct the jury based upon WPIC 17.02 which has previously been determined to be a confusing instruction? (CP 91; Instruction No. 35)

5. Was defense counsel ineffective for failure to object to the giving of WPIC 17.02?

6. When a trial court initially denies specific items of restitution, must the State timely file a motion for reconsideration, and, if so, does failure to do so void the restitution ordered?

STATEMENT OF THE CASE

Mr. Prado went to Trav's Restaurant and Lounge late in the evening on July 26, 2005. He remained until closing on July 27, 2005. Sherry Hane, Sharon Davis, and Jacquelynn Dickerson are all employees of Trav's and saw Mr. Prado that night. (Trial RP 292, ll. 1-3; RP 292, ll. 17-21; RP 323, l. 18; RP 325, ll. 2-7; RP 521, l. 11; RP 529, l. 21 to RP 530, l. 23)

Belinda Dillard and Danny Guyer were also at Trav's on the evening of July 27. They were seen by the same employees. (Trial RP 293, ll. 23-24; RP 324, ll. 3-8; RP 523, ll. 13-16)

When Mr. Guyer left to go to the bathroom, Ms. Dillard approached Mr. Prado, started a conversation with him, and ended up kissing him. (Trial RP 327, ll. 1-5; RP 330, ll. 10-20; RP 338, ll. 1-4; RP 339, ll. 15-19; RP 361, ll. 14-15; RP 529, l. 21 to RP 530, l. 23; RP 554, ll. 1-7; RP 556, ll. 1-6)

Ms. Dillard and Mr. Guyer left Trav's prior to Mr. Prado. When they got outside Ms. Dillard told Mr. Guyer about the kiss. Mr. Guyer became angry, got in a car and drove off. He left Ms. Dillard outside of Trav's. (Trial RP 340, ll. 15-21)

Mr. Prado also left Trav's and got into his car. As he was leaving the area he saw Ms. Dillard walking on the sidewalk. He pulled along-side of her. He asked her whether or not she wanted a ride. She declined

the offer. Mr. Prado asked a second time and she again refused. (Trial RP 341, ll. 16-24; RP 559, l. 11 to RP 560, l. 3)

As the conversation continued between Mr. Prado and Ms. Dillard, Mr. Guyer arrived at a high rate of speed and pulled his car in front of Mr. Prado's car. Mr. Guyer jumped out and began banging on the driver's side window of Mr. Prado's car. He pounded on the window numerous times. (Trial RP 342, ll. 13-20; RP 343, ll. 1-4; RP 547, ll. 19-21; RP 548, ll. 11-15; RP 560, ll. 6-13; ll. 14-23)

Mr. Prado was startled by Mr. Guyer's actions and raised his hands defensively. He was afraid the window was going to break. He then grabbed a knife out of the center console of his car. He got out to confront Mr. Guyer. (Trial RP 308, ll. 8-9; RP 561, ll. 8-11)

Mr. Guyer was immediately in Mr. Prado's face. A struggle occurred. Mr. Guyer was stabbed twice. (Trial RP 310, ll. 4-13; RP 318, ll. 8-10; RP 353, ll. 2-3; RP 562, ll. 8-12; ll. 17-19; RP 563, ll. 12-14)

While Mr. Prado and Mr. Guyer were struggling, Mr. Prado's car was rolling backwards. Ms. Dillard leaned in the car in an attempt to stop it. She finally stopped it after it hit a pole. She did not see what happened between the two (2) men. (Trial RP 343, ll. 12-17; RP 343, l. 25 to RP 344, l. 3)

Jeff Husted, who was driving by the scene, stopped to see what was happening. He was watching Ms. Dillard try to stop Mr. Prado's car. He did not see what happened between Mr. Prado and Mr. Guyer. Mr.

Husted estimated that only five to ten seconds elapsed while everything occurred. (Trial RP 308, ll. 8-9; ll. 12-13; ll. 18-23; RP 309, ll. 3-7; RP 315, ll. 4-6; RP 321, ll. 4-13)

As soon as Mr. Prado's car stopped, Ms. Dillard got out. Mr. Prado immediately got in the car and drove off. Mr. Guyer ran to Mr. Prado's car and kicked the door twice as he was driving away. (Trial RP 297, ll. 16-17; RP 298, ll. 3-21; RP 309, ll. 13-19; RP 344, ll. 5-14; RP 564, ll. 10-12; RP 565, ll. 12-16; RP 566, ll. 5-6)

Mr. Guyer then ripped off his shirt, claimed he couldn't breathe, staggered to the sidewalk and fell against a wall. Mr. Husted and Ms. Dillard saw that he was bleeding. (Trial RP 298, ll. 20-21; RP 309, ll. 13-16; RP 344, ll. 12-13)

After leaving the area Mr. Prado drove home. He threw the knife in the garbage. He removed the lens cover from the dome light in his car and placed it in a cabinet inside the house. (Trial RP 444, ll. 17-25; RP 567, ll. 3-5)

Mr. Guyer was transported to Central Washington Hospital. He died later that morning. (Trial RP 287, ll. 23-25; RP 489, ll. 23-24)

An autopsy was performed on Mr. Guyer. He was five foot nine inches (5' 9") tall and weighed one hundred seventy-five (175) pounds. He had some superficial hand injuries and two (2) stab wounds (*i.e.,* left upper chest and left lateral chest). (Trial RP 453, ll. 6-8; RP 454, ll. 4-11; ll. 21-22; ll. 24-25)

The left upper chest wound entered Mr. Guyer's heart. It was fatal. (Trial RP 463, ll. 2-15)

It was determined that Mr. Guyer's blood alcohol content was .11. (Trial RP 465, l. 2)

Mr. Prado turned himself into the Wenatchee Police Department later that day. He is five foot seven inches (5' 7") to five foot eight inches (5' 8") tall and weighs approximately one hundred twenty (120) pounds. (Trial RP 259, ll. 8-11; RP 396, ll. 4-8; RP 397, ll. 13-18; RP 422, l. 24 to RP 423, l. 1)

An Information was filed on July 29, 2005 charging Mr. Prado with second degree murder. (CP 652)

A Second Amended Information was filed on January 4, 2006. It added an additional count of first degree assault by use of a deadly weapon. (CP 595)

Mr. Prado testified at trial and stated:

> "… I knew that I needed to do what I needed to do, that I needed to defend me and that if he got ahold of the weapon, that he was going to use it against me."

(Trial RP 569, ll. 12-14)

Mr. Prado further testified that everything happened so quickly that he did not have time to think. He did not mean to stab Mr. Guyer and had

grabbed the knife to make Mr. Guyer withdraw. (Trial RP 569, l. 25 to RP 570, l. 1; RP 580, ll. 22-23; RP 585, ll. 12-24)

Mr. Prado only remembers stabbing Mr. Guyer once. He testified that he was holding the knife in his right hand where Mr. Guyer could see it. He believed it was possible that the other stab wound occurred when Mr. Guyer grabbed him and they went against the car. (Trial RP 561, ll. 23-25; RP 562, ll. 8-12; RP 588, ll. 15-18)

The jury found Mr. Prado not guilty of second degree murder. (CP 10)

The jury found Mr. Prado guilty of first degree assault. A special verdict determined he was armed with a deadly weapon. (CP 14; CP 17)

Judgment and Sentence was entered on January 23, 2006. The sentencing court denied a mitigated sentence. (CP 18; RP 43)

Mr. Prado filed his Notice of Appeal on February 6, 2006. (CP 8)

Restitution hearings were conducted on March 20, 2006, May 15, 2006 and June 14, 2006. The June 14 hearing included an oral motion for reconsideration by the State concerning a prior denial of restitution in the amount of $2,576.00. (03/20/06 RP 4, l. 1 to RP 5, l. 8; RP 6, l. 23 to RP 7, l. 1; RP 10, ll. 6-15; 05/15/06 RP 2, ll. 8-25; 06/14/06 RP 2, ll. 16-19; RP 4, ll. 19-23; RP 17, l. 15; RP 19, ll. 20-21; CP 677; CP 682)

SUMMARY OF ARGUMENT

Instructional error which prevents a criminal defendant from being able to argue lesser-included offenses, valid defenses, or the State's failure to overcome a defense beyond a reasonable doubt, constitutes a deprivation of the constitutional rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Const. art. I, §§ 3 and 22.

Defense counsel's failure to insure that proper jury instructions were submitted constituted ineffective assistance of counsel.

The State's failure to timely file a motion for reconsideration, when a sentencing court initially denies restitution, precludes the subsequent grant of that restitution. The order entered is void.

ARGUMENT

I. INSTRUCTIONS

A. "No Duty to Retreat"

Instruction No. 22 states:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by use of lawful force. The law does not impose a duty to retreat.

(Trial RP 625, ll. 19-23; CP 78)

Instruction No. 22 was placed at the end of the instructions pertaining to second degree murder and the lesser-included offenses of first degree manslaughter and second degree manslaughter.

Instruction No. 23 was the definition of first degree assault. The Court did not repeat the "no duty to retreat" instruction in conjunction with the instructions relating to first degree assault and its lesser-included offenses. (Instructions 23 through 35; CP 79-91)

Interestingly enough, the trial court repeated the "lawful defense" instruction for both second degree murder and first degree assault. (Instructions 19 and 35; CP 75; CP 91)

Mr. Prado asserts that by placing the "no duty to retreat" instruction at the end of the instructions relating to second degree murder, he was deprived of that instruction insofar as it pertains to first degree assault. As such, he was not given a fair opportunity to argue his theory of the case – self defense/defense of property.

> Before addressing whether an instruction fairly allowed the parties to argue the case, the court must first determine whether the instruction accurately stated the law without misleading the jury. *State v. Acosta,* 101 Wn.2d 612, 619-20, 683 P.2d 1069 (1984). Jury instructions must be relevant to the evidence presented. *State v. Hughes,* 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Instructing the jury so as to relieve the State of its burden to prove all of the elements of the case is reversible error. *State v. Scott,* 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

> A constitutional error is harmless only if we are convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002).

The "no duty to retreat" instruction was relevant both as to second degree murder and first degree assault. The failure of the trial court to clearly explain to the jury that that particular instruction could be applied to both offenses deprived Mr. Prado of his right to have the State prove the absence of self-defense/defense of property beyond a reasonable doubt.

Mr. Prado contends that this error is further compounded by other instructional error as discussed *infra.*

Moreover, the Court must keep in mind that even reading the instructions as a whole does not remedy the placement of the "no duty to retreat" instruction with the instructions relating to second degree murder.

> Errors in instructions are reviewed *de novo.* Jury instructions are to be read as a whole and each instruction is read in the context of all others given. "[A] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case." The court need not give a party's proposed instruction if it is repetitious or collateral to instructions already given.

State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997).

Even though the "no duty to retreat" instruction would have been repetitious if given a second time, the trial court did give two (2)

instructions on "lawful force." The trial court specifically delineated that the respective instructions were to be used with regard to the individual counts contained in the Information.

By not repeating the "no duty to retreat" instruction and/or telling the jury it was applicable to both Counts, the Court in effect told the jury that it only applied to second degree murder. This was clearly erroneous.

B. Lesser-Included Offenses

1. Reckless Endangerment

RCW 9A.36.050(1) states:

> A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates **a substantial risk of death or serious physical injury to another person.**

(Emphasis supplied.)

Mr. Prado contends that reckless endangerment is a lesser-included offense of first degree assault as charged in the Information.

RCW 9A.36.011(1) provides, in part:

> A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a … deadly weapon or by any force or means likely to **produce great bodily harm or death** ….

(Emphasis supplied.)

In *State v. Rivera,* 85 Wn. App. 296, 302, 932 P.2d 701 (1997), the Court stated:

> … Assault in the first degree does not require proof of reckless endangerment. RCW 9A.36.011(1); RCW 9A.36.045(1). The offenses do not merge.
>
> Mr. Rivera also argues that reckless endangerment is a lesser-included offense of first degree assault. We rejected that same argument in *State v. Ferreira*, 69 Wn. App. 465, 470, 850 P.2d 541 (1983).

The *Ferreira*[1] Court also addressed RCW 9A.36.045. RCW 9A.36.045 is the drive-by shooting statute. As the *Ferreira* Court noted at 470:

> The intent of the Legislature in adopting RCW 9A.36.045, the so-called "drive-by shootings" statute, was explained as follows:
>
> > The legislature finds that increased trafficking in illegal drugs has increased the likelihood of "drive-by shootings." It is the intent of the legislature in sections 102, 109, and 110 of this act to categorize such reckless and criminal activities into a separate crime and to provide for an appropriate punishment.
>
> LAWS OF 1989, ch. 271, § 108.

The courts have yet to address whether RCW 9A.36.050 is a lesser-included offense of either first or second degree assault.

Mr. Prado asserts that it is obvious that reckless endangerment is a lesser-included offense of first degree assault when the particular elements of each offense are compared.

[1] *State v. Ferreira*, 69 Wn. App. 465, 470, 850 P.2d 541 (1983)

Reckless conduct is a less culpable mental state than intent. RCW 9A.08.010(1)(a) and (c).

As clearly stated in RCW 9A.08.010(2): "… [W]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly."

Since intent establishes recklessness, recklessness is necessarily a lesser-included culpable mental state of intent.

Reckless endangerment requires that a person's conduct "create a substantial risk of death or **serious physical injury** to another person."

First degree assault requires that the conduct be "likely to produce great bodily harm or death."

"'Great bodily harm' means bodily injury which creates a probability of death … or which causes a significant permanent loss or impairment of the function of any bodily part or organ …" RCW 9A.04.110(4)(c).

"'Bodily injury, physical injury, or bodily harm' means physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110(4)(a).

Serious physical injury is a lesser injury than "great bodily harm."

"Serious physical injury" is not defined. Mr. Prado contends it lies somewhere between the definition of "great bodily harm" and "bodily injury."

Finally, Mr. Prado equates the phrases "a means **likely** to produce" and "a **substantial risk**" as meaning the same thing.

Neither phrase is defined by statute. Thus, resort to the dictionary meaning of the respective terms is appropriate. *See:*

The word "substantial" means:

> **1.** of ample or considerable amount, quantity, size, etc. … **2.** of a corporeal or material nature; tangible; real. …

WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.).

The word "likely" means:

> **1.** probably or apparently destined … **2.** … fact, or certainty; reasonably to be believed or expected; … **5.** probably ….

WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.).

Use of a deadly weapon, depending upon how it is used, could "likely … produce great bodily harm or death"; or could "create a substantial risk of death or serious physical injury."

Mr. Prado asserts that this is an issue of first impression in the State of Washington. Reckless endangerment, as defined in RCW 9A.36.050, is a lesser-included offense of first degree assault.

The trial court's refusal to give the proposed lesser-included offense instruction was error. (Trial RP 606, ll. 14-19; CP 107)

2. RCW 9.41.270(1)

RCW 9.41.270(1) provides, in part:

> It shall be unlawful for any person to … exhibit, display, or draw any … knife … in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

Mr. Prado requested an instruction based upon RCW 9.41.270(1). The trial court did not give the instruction. (Trial RP 606, l. 20 to RP 607, l. 4; CP 109)

The use of an instruction based upon RCW 9.41.270(1) has been approved in conjunction with cases involving second degree assault with a deadly weapon.

> … All of the elements of RCW 9.41.270(1) are necessary elements of second degree assault. … A person who displays a firearm in the manner described, also commits some, but not all of the acts necessary for commission of second degree assault.

State v. Baggett, 103 Wn. App. 564, 569, 13 P.3d 659 (2000); *see also State v. Ward*, 125 Wn. App. 243, 248-49; 104 P.3d 670 (2004).

The trial court determined that second degree assault under RCW 9A.36.021(1)(c) was a lesser-included offense of first degree assault. RCW 9A.36.021(1)(c) involves assault "with a deadly weapon."

Mr. Prado contends that if RCW 9.41.270(1) is a lesser-included offense of second degree assault under RCW 9A.36.021(1)(c), and second degree assault with a deadly weapon is a lesser-included offense of RCW

9A.36.011(1)(a), then it necessarily follows that RCW 9.41.270(1) is also a lesser-included offense of first degree assault with a deadly weapon.

An instruction based upon RCW 9.41.270(1) was critical to Mr. Prado's defense. The trial court's refusal to give the instruction was error.

Mr. Prado clearly stated that he got out of his car with the knife in hand so that Mr. Guyer would see it. He also clearly stated that it was his intent to intimidate Mr. Guyer; not stab him.

"It is not error, … to reject a requested instruction when its subject matter is adequately covered in other instructions." *State v. Kidd*, 57 Wn. App. 95, 99, 786 P.2d 847 (1990).

The problem is that this particular aspect of Mr. Prado's defense was not adequately covered by the other instructions. In fact, the other instructions injected an element of confusion with regard to Mr. Prado's defense. *See:* C., *infra.*

The trial court should have given the instruction to the jury so that Mr. Prado could fully argue his case.

C. Defective Instruction

Mr. Prado claims that the trial court gave a defective instruction in connection with the issue of self-defense/defense of property.

Instruction No. 35 reads, in part:

> … The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the

> person or a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than what is necessary. ….

(CP 91)

This particular portion of Instruction No. 35 was recently termed "problematic" by *State v. Bland*, 128 Wn. App. 511, 514 (2005).

The *Bland* Court noted at 515:

> … "[T]he standard for clarity in a jury instruction is higher than for a statute." The instruction on defense of property must be **manifestly clear.**

(Emphasis supplied.)

The same problem which the *Bland* Court noted in that instruction persists in the instruction given in Mr. Prado's case.

The *Bland* Court made two critical observations that are applicable to Mr. Prado's case:

> Whether the use of force used in the defense of property is greater than is justified by the existing circumstances is a question of fact for the jury to determine under proper instructions.

State v. Bland, supra, 516.

> Although the use of deadly force is not justified to expel a mere nonviolent trespasser, under certain circumstances necessary force may include putting a trespasser in fear of physical harm.

State v. Bland, supra, 517.

When Instruction No. 35 is considered in conjunction with:

(1) the trial court's refusal to give an instruction based upon RCW 9.41.270(1);, and

(2) the second observation made by the *Bland* Court;

it becomes readily apparent that Mr. Prado did not have the opportunity to fully and effectually argue his defense theory to the jury.

A careful review of defense counsel's closing argument further supports Mr. Prado's contention. Even though defense counsel addressed the issue, in the absence of jury instructions to support the argument, the jury was left in limbo. They could only conclude that the particular amount of force used by Mr. Prado, including his own statement that he only intended to intimidate Mr. Guyer, could not be considered in conjunction with his self-defense/defense of property argument as it pertained to first degree assault. (Trial RP 657, l. 23 to RP 659, l. 4; RP 661, ll. 2-6)

It has long been the law in the State of Washington that neither criminal nor civil liability will attach when a person lawfully in possession of property exerts force to protect that property. *See: State v. Ladiges,* 66 Wn. (2d) 273, 276 (1965).

Mr. Prado feared not only for his personal safety; but also the safekeeping of his car.

The trial court's failure to properly instruct the jury on lesser-included offenses, combined with the giving of an improper instruction, as

well as the questionable placement of the "no duty to retreat" instruction, all served to adversely impact Mr. Prado's defense.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Even though Instruction No. 35 was proposed by defense counsel, the doctrine of invited error does not apply under the facts and circumstances of Mr. Prado's case. *See: State v. Aho,* 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999).

When a claim of ineffective assistance of counsel is raised, the appellate court has an established standard upon which to make its determination. *See: Strickland v. Washington,* 466 U.S. 668, 687, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984)

> Courts engage in a strong presumption counsel's representation was effective. [Citations omitted.] … The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. …

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)

Mr. Prado asserts that the presumption is overcome under the facts and circumstances of his case. Defense counsel should have been aware of the *Bland* case.

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation

> prejudiced the defendant, *i.e.*, there was a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, supra, 334-35.

Giving an instruction previously declared confusing by an appellate court clearly constitutes deficient performance by defense counsel. *Bland* declared the instruction prejudicial to the issue of defense of property. Both prongs of the *Strickland* test are met.

III. RESTITUTION

Restitution is governed by the provisions of RCW 9.94A.753. Subparagraph (1) of that statute provides, in part:

> When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred and eighty days except as provided in subsection (7) of this section. ….

The trial court initially denied restitution for a headstone and burial expenses paid for by Mr. Guyer's family.

> A restitution recipient must be a "victim." The statute defines victim as a "person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(37) [now RCW 9.94A.030(47)].

State v. Kisor, 82 Wn. App. 175, 183, 916 P.2d 978 (1996).

Mr. Prado asserts that the trial court was correct when it initially denied restitution for the specified items.

The State asked the Court to reconsider its decision. However, the request was not timely.

> The power to order restitution is derived only from statute. … [T]he rules of the civil law should not be imported as a limitation to the sentencing authority granted by the legislature to criminal courts.

State v. Ewing, 102 Wn. App. 349, 353-54, 7 P.3d 835 (2000).

A careful review of RCW 9.94A.753 reveals that the only time frame included within the statute is that the restitution hearing be held within one hundred eighty (180) days of the sentencing date.

A restitution hearing was conducted on March 20, 2006. The trial court entered its decision on March 24, 2006. The State did not seek reconsideration until June 14, 2006.

Mr. Prado asserts that the State's request for reconsideration must comply with CrR 7.8(c)(1) which provides:

> Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavit setting forth a concise statement of the facts or errors upon which the motion is based.

The State did not file a written motion. The State did not file a written affidavit. *See: State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996).

The Criminal Rules for Superior Court do not address motions for reconsideration. The Civil Rules for Superior Court do address motions for reconsideration.

CR 59(b) provides, in part:

> A motion for … reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.
>
> A motion for … reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

It is apparent that the State was required to file a written motion and written affidavit in support of its request for reconsideration. The State's failure to do so voids the sentencing court's restitution order.

Since no criminal rule addresses motions for reconsideration, and the civil rules have a specified time period, Mr. Prado argues that they should be applied under the rule of lenity.

"'If a rule is ambiguous, the rule of lenity requires it be strictly and liberally construed in favor of the defendant.'" *State v. Hamilton*, 121 Wn. App. 633, 639, 90 P.3d 69 (2004), quoting *State v. Wachter*, 71 Wn. App. 80, 83, 856 P.2d 732 (1993) (*citing State v. Wilbur*, 110 Wn.2d 16, 19, 749 P.2d 1295 (1988)).

CONCLUSION

Multiple instances of instructional error require reversal of Mr. Prado's conviction and remand for a new trial.

Ineffective assistance of counsel compounded the instructional error and deprived Mr. Prado of a constitutionally fair trial.

In the event Mr. Prado's conviction is not reversed, the restitution order concerning the headstone and burial expenses should be declared void.

DATED this _____ day of August, 2006.

Respectfully submitted,

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